DEPARTMENT OF THE ARMY
HEADQUARTERS UNITED STATES ARMY FORCES COMMAND
1777 HARDEE AVENUE SW
FORT MCPHERSON GEORGIA 30330-1062

REPLY TO
ATTENTION OF

AFLG-PROA (715) 10 Mar 97

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Contracting Information Letter (CIL) 97-23, Protest Analysis for First Quarter FY 97

1. The following statistics and information apply to GAO protests filed in the first quarter of FY 97:

	1Q97
Total protests filed in DA	156
Protests filed in FORSCOM	19

2. The following protest involving FACNET is of particular interest:

Middletown Tractor Sales (Fort Drum). Middletown Tractor Sales protested the purchase of a mower attachment pursuant to Request For Quotations (RFP) DAKF36-96-T-0150, issued over Federal Acquisition Network (FACNET). The Fort Drum Directorate of Contracting (DOC) never received protester's electronically submitted quote, and protester did not call to confirm receipt. The Army persuaded protester to withdraw the protest principally because the Fort Drum DOC included the following provision in the RFQ:

ATTENTION CONTRACTORS;

DUE TO POSSIBLE TRANSMISSION PROBLEMS THROUGH EDI, CONTRACTORS ARE REQUIRED TO CONFIRM RECEIPT OF QUOTE. EITHER CALL PURCHASING AGENT AT (123) 123-4567 OR FAX (123) 123-4567.

Inserting a similar provision in RFQs issued through FACNET may be one way to comply with the GAO's mandate in SDM Supply, Inc.,(B-271492), 26 Jun 96, 96-1 CPD 288, to: "have adequate procedures in place to ensure that quotations received through FACNET would be considered."

AFLG-PROA
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3. The enclosed protests are of interest to all in the contracting field.

4. For additional information, please contact Irene Hamm, DSN 367-5632 or email hammi@ftmcphsn-emh1.army.mil.

TONI M. GAINES
Chief, Contracting
Division, DCSL&R
Principal Assistant
Responsible for Contracting

5 Encls
1. PI Construction
2. Nations, Inc
3. IGIT, Inc.
4. Harry A. Stroh Assoc.
5. The Cowperwood Co.

B-272174 and B-272177
2 Oct 96
Matter of PI Construction Company

Paralee White, Esq., and Joseph A. Zillo, Esq., Cohen & White, for the protester. David R. Kohler, Esq., Small Business Administration, Marian E. Sullivan, Esq., Department of the Air Force, and Maj. Michael J. O'Farrell, Jr., Department of the Army, for the agencies. Linda S. Lebowitz, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Small Business Administration (SBA) failed to follow its published regulatory implementation of the statutory requirement that 8(a) construction contracts be awarded to 8(a) concerns located within the county or state where the work will be performed by imposing geographic restrictions linking the eligibility of an 8(a) concern to compete for such contracts with the location at which the 8(a) concern maintains its principal place of business, as opposed to a branch office.

DECISION

PI Construction Company protested as unduly restrictive of competition the geographic restriction contained in request for proposals (RFP) F04626-96-R-0105, issued by the Air Force, and RFP DABT31-96-R-0003, the Army.

We sustain the protests.

The RFPs were issued as competitive small disadvantaged business set-asides under section 8(a) of the Small Business Act, 15 U.S.C. sec. 637(a) (1994), for construction requirements. In accepting the respective Air Force and Army requirements for competition in the 8(a) program, the SBA directed that competition under the Air Force procurement be limited to 8(a) concerns serviced by eight SBA District Offices and one SBA Branch Office in Arizona, California, Nevada and Hawaii (SBA Region IX), and competition under the Army procurement be limited to 8(a) concerns serviced by two SBA District Offices in Missouri (SBA Region VII). The SBA stated that "[a]ll other firms [would be] deemed ineligible to submit offers." In accordance with the SBA's direction, the Air Force and Army included the specified geographic restrictions in the synopses published in the Commerce Business Daily.

The protester, an 8(a) concern with its principal place of business in Denver, Colorado, but which also maintains a branch office with at least one full-time employee in the appropriate geographic areas in California and Missouri, recognized that the Small Business Act, 15 U.S.C. sec. 637(a)(11), requires "[t]o the maximum extent practicable" that 8(a) construction contracts "be awarded within the county or state where the work is to be performed." The protester did not question the regulatory authority of the SBA to impose geographic restrictions for construction requirements. However, the protester argued that the SBA's regulatory implementation of this statutory provision provided no basis for the SBA to restrict 8(a) competitions for construction requirements according to an 8(a) concern's principal place of business, defined at 13 C.F.R. sec. 124.100 (1996) as "the location at which the business records of the [8(a)] concern are maintained and the location at which the individual who manages the concern's day-to-day operations spends the majority of his/her working hours."

The protester pointed out that in Jun 95, the SBA promulgated new regulations governing the 8(a) program. These regulations provide as follows:

"Construction competitions. Where a construction requirement offered to the 8(a) program exceeds the $3 million competitive threshold, SBA will determine, based on its knowledge of the 8(a) portfolio, whether the competition should be limited only to those program participants located within the geographical boundaries of one or more SBA district offices, an entire SBA regional office, or adjacent SBA regional offices. Only those participants located within the appropriate geographical boundaries are eligible to submit offers." 13 C.F.R. sec. 124.311(g)(3).

The SBA did not define in its new regulations the basis upon which an 8(a) program participant would be considered "located within the appropriate geographical boundaries" in order to be deemed eligible to compete.[1]

The protester also referenced the SBA's preamble to its regulations, as published in the Federal Register, 60 Fed. Reg. 29,969, 29,971 (7 Jun 95), which addressed the statutory requirement that 8(a) construction contracts be awarded to 8(a) concerns located within the county or state where the work will be performed. The SBA explained in its preamble that competition for 8(a) construction requirements would be limited:

"to those program participants within the geographical boundaries of one or more SBA district offices. SBA believes that a program participant may be considered as being located within a geographical boundary if it regularly maintains an office which employs at least one full-time individual within that geographical boundary."

In light of the SBA's statement in its preamble, the protester contended that regardless of the fact that it maintains its principal place of business in Colorado, it should be considered eligible to compete under each of the referenced 8(a) solicitations since it regularly maintains a branch office with at least one full-time employee within the appropriate geographic areas in California and Missouri, as designated by the SBA.

The SBA responded that while it announced a "general statement of policy" in the preamble, specifically, that "it might in appropriate cases apply a less restrictive definition of the term 'located within the geographic boundaries'" to include 8(a) concerns which regularly maintain an office with at least one full-time employee within a designated geographic area, it is not required to use this "more expansive" definition in all cases and will do so in its discretion when practicable or when necessary to provide developmental assistance to 8(a) concerns unable to effectively compete on a national basis.

Section 8(a) of the Small Business Act, 15 U.S.C. sec. 637(a), authorizes the SBA to enter into contracts with government agencies and to arrange for performance through subcontracts with socially and economically disadvantaged small business concerns. Federal Acquisition Regulation sec. 19.805 (FAC 90-8) and 13 C.F.R. sec. 124.311 provide for government competitively awarded contracts set aside for section 8(a) qualified concerns. Because of the broad discretion afforded to the SBA and the contracting agencies under the applicable statute and regulations, the GAO review of actions under the section 8(a) program is generally limited to determining whether government officials have violated applicable regulations or engaged in bad faith. See Bid Protest Regulations, 4 C.F.R. sec. 21.5(b)(3) (1996). The GAO concluded that the SBA's decision to link the eligibility of an 8(a) concern to compete for 8(a) construction contracts to the geographic location where the 8(a) concern maintains its principal place of business, as opposed to a branch office, is not consistent with the SBA's published regulatory implementation of the statutory requirement that such contracts be awarded within the county or state where the work will be performed. Subsequent internal agency action by the SBA regarding its published regulatory implementation was inconsistent with the notice and comment requirements of the

Administrative Procedure Act (APA), 5 U.S.C. sec. 553, as adopted by the SBA at 13 C.F.R. sec. 101.108.

The GAO stated there is no question that the SBA has authority to impose geographic restrictions in furtherance of its program needs. See, e.g., Border Maintenance Serv., Inc., 72 Comp. Gen. 101 (1993), 93-1 CPD para. 97, recon. denied, 72 Comp. Gen. 265 (1993), 93-1 CPD para. 473. Here, the SBA, at 13 C.F.R. sec. 124.311(g)(3), simply provides that only 8(a) program participants "located within the appropriate geographical boundaries" are eligible to compete for 8(a) construction contracts. In its regulations the SBA does not define this phrase or otherwise place 8(a) concerns on notice that in certain circumstances, as a prerequisite to competing for these contracts, an 8(a) concern may be required to maintain its principal place of business, as opposed to a branch office, in the designated geographic areas where the work will be performed. However, the SBA clearly stated in its regulatory preamble that an 8(a) concern "may be considered as being located within a geographical boundary if it regularly maintains an office which employs at least one full-time individual within that geographical boundary." Although the SBA characterizes the definitional language in its preamble as a non-binding, discretionary statement of policy which essentially can be ignored in light of its use of the term "may," we do not agree.

The preamble to a regulation should be considered in constructing and in determining the meaning of the regulation. See Wiggins Bros., Inc. v. Dep't of Energy, 667 F.2d 77 (Temp. Emer. Ct. App. 1981). Under federal rules of construction of legislative regulations, definitions in a preamble may not be ignored. Id. While the term "may" in a regulation is generally construed as permissive, rather than mandatory, the construction of such term--whether discretionary or mandatory--is reached in each case on the context of the regulation and on whether it is fair to be presumed that it was the intention of the agency to confer discretion or to impose an imperative requirement. See United Hosp. Center, Inc. v. Richardson, 757 F.2d 1445 (4th Cir. 1985). Courts have often interpreted "may" as connoting a mandatory meaning. Id.

Despite the SBA's use of the term "may," the GAO concluded that the structure and the context of the regulatory preamble sentence at issue is one of definition, not one creating discretion. This sentence begins with a declaratory phrase, "SBA believes that," followed by the SBA actually defining those 8(a) concerns which it believes are located within a designated geographic area, specifically, not only 8(a) concerns headquartered in these areas, but also 8(a) concerns with branch offices in these

areas.[2] This preamble language fills the definitional void in the regulations themselves, and it is the preamble which reflects the SBA's intent regarding the basis for a determination of the eligibility of an 8(a) concern to compete for 8(a) construction requirements. We believe the SBA has provided no persuasive reason to ignore the definition in its preamble which supports the protester's position that because it maintains a branch office in each of the designated geographic areas, it should be considered eligible to compete under the referenced 8(a) solicitations.

Moreover, subsequent internal agency action by the SBA belies its position that it has discretion to ignore the definition of the phrase "located within the appropriate geographical boundaries," as provided in its regulatory preamble. In this regard, on 7 Aug 95, just 2 months after the effective date of the SBA's new regulations governing the 8(a) program, the SBA issued an internal agency procedural notice stating that:

"[t]he SBA published a final rule in the Federal Register on 7 Jun 95, that contained two sentences that should not have appeared. A correction to the 7 June 95, final rule will be published to delete the following sentences: 'SBA believes that a program participant may be considered as being located within a geographical boundary if it regularly maintains an office which employs at least one full-time individual within that geographical boundary.'"[3]

The SBA reported that its original inclusion of the preamble language under discussion was "inadvertent," and it had not yet issued a subsequent Federal Register notice deleting this language. The SBA explains that it had:

"decided to see whether the subject language [in the preamble] could help it achieve its objective of promoting sufficient competition to assure adequate performance at a fair price within those local buy areas where SBA would otherwise increase the size of the local buy area.

"The Agency has not yet completed its examination of that question. If the language has no substantial affect on our ability to ensure sufficient competition to assure adequate performance at a fair price within local buy areas, or if the administration of the program with this language in it becomes excessively burdensome or confusing, it is likely that SBA will rescind the language. If, on the other hand, SBA finds that the language stimulates competition and enhances the quality of 8(a) performance in local areas, SBA will likely retain the language."

The SBA's internal implementation of a change to a published regulatory definition which impacts the basis upon which the SBA determines the eligibility of 8(a) concerns to compete for 8(a) construction requirements is inconsistent with the SBA's commitment to follow the public notice and comment procedures of the APA. In this regard, the SBA states that it "will follow the public participation requirements of the [APA], 5 U.S.C. sec. 553, in rulemakings relating to public property, loans, grants, benefits, or contracts." 13 C.F.R. sec. 101.108. Public participation requirements include notice and comment procedures. See Analyses Corp. v. Bowles, 827 F. Supp. 20 (DDC 1993) (SBA did not justify its failure to comply with the notice and comment requirements of the APA). Absent prior public notice, the GAO did not think that 8(a) concerns, like the protester, could reasonably expect based on the SBA's published regulatory implementation that the SBA would be deciding on a solicitation-by-solicitation basis whether 8(a) concerns with branch offices only in the designated geographic areas would be considered eligible to compete for 8(a) construction requirements.

The GAO recognized that the SBA has discretion to promulgate a different, less expansive definition of the phrase "located within the appropriate geographical boundaries," even placing 8(a) concerns on notice that if the SBA determines that an appropriate level of competition exists in a designated geographic area, a prerequisite to competing may be a requirement that the 8(a) concern be headquartered in this area, we conclude that such a change in the published regulatory implementation must be accomplished not internally, but rather in accordance with the public rulemaking requirements of the APA, as adopted by the SBA at 13 C.F.R. sec. 101.108.

For the reasons discussed, and by letter to the Administrator of the SBA, the GAO recommended, based on the SBA's published regulatory implementation, that the SBA afford the protester and other 8(a) concerns similarly situated, that is, those having branch offices as opposed to principal places of business in the designated geographic areas, an opportunity to compete under each of the referenced 8(a) solicitations. The SBA was to advise the Air Force and Army to amend the basis for competition for the respective requirements. The GAO also recommended that the SBA reimburse the protester for the costs of filing and pursuing its protests, including reasonable attorneys' fees.[4] 4 C.F.R. sec. 21.8(d).

1 The SBA defines a "[p]rogram [p]articipant" as "a small business concern participating in the [8(a) Program]." 13 C.F.R. sec. 124.100. A program participant is serviced "in the field office serving the territory in which the concern's principal place of business, as defined in [13 C.F.R.] sec. 124.100, is located." 13 C.F.R. sec. 124.203.

2. In this sentence, the word "believes," not "may," is the operative verb.

3. The second sentence to be deleted addresses the award of sole source 8(a) construction contracts based on the same branch office geographic restriction.

4. In its report filed in response to each of these protests, the SBA expressly states that the geographic restrictions in the referenced solicitations are the SBA's, not the Air Force's or Army's.

B-272455
5 Nov 96
Nations, Inc.

William H. Butterfield, Esq., Kilcullen, Wilson and Kilcullen, for the protester. Nicholas P. Retson, Esq., Marvin Kent Gibbs, Esq., and Kim K. Judd, Esq., Department of the Army, for the agency. Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that solicitation covers "advisory and assistance" services, and thus improperly provides for award of a single requirements contract, is sustained; professional technical services in support of battlefield simulation training fall within statutory and regulatory definitions of advisory and assistance services, and such services must be procured under multiple award, indefinite delivery, indefinite quantity-type contracts where, as here, contract price will exceed $10 million and contract term exceeds 3 years.

DECISION

Nations, Inc. protests the terms of request for proposals (RFP) DABT65-96-R-0001, issued by the Department of the Army for services in support of various computer simulation training facilities. Nations principally maintains that the RFP improperly contemplates the award of a single requirements type contract rather than multiple indefinite delivery, indefinite quantity (IDIQ) type contracts.

We sustain the protest.

As part of their training, Army officers participate in interactive, "event driven" computer simulation exercises employing scenarios that realistically model the capabilities of the Army, allied forces and selected opposing forces. These exercises are conducted at numerous facilities throughout the US by the Army's Training and Doctrine Command TRADOC) . The RFP called for contractor personnel to provide an array of support services in connection with TRADOC's simulation training program. These services included technical preparation for and assistance in executing the exercises (loading the appropriate data or scenarios into the simulation computers, participating as

"interactors" and providing data during post-exercise review sessions conducted by the agency's personnel), evaluation of government-supplied enhancements to the simulators, drafting descriptive software change requests generated by the agency, and recommending computer hardware for system upgrades.

The RFP contemplated the award of a single task order contract--a combination fixed-price, lump-sum (for performance of work at Fort Leavenworth), and requirements contract (for performance of additional work at Fort Leavenworth, and at numerous other Army schools). The RFP provided for a phase-in period, a base year and three 1-year options. If all of the estimated requirements quantities are ordered, the value of the contract will exceed $10 million.

The protester maintained that the services under the requirements portion of the RFP are "advisory and assistance" services, and that Federal Acquisition Regulation (FAR) sec. 16.503(d) (FAC 90-41) precludes the use of a requirements type contract for the purchase of such services where, as here, the agency has not made a written determination that the services in question are so unique or highly specialized that it is not practicable to make multiple IDIQ contract awards. Nations concluded that the RFP should be amended accordingly.

The agency does not dispute that the contract will exceed the duration and dollar value thresholds, but maintained that the services in question did not fall within the definition of advisory and assistance services, and that an IDIQ contract thus is not required. The Army maintained that the FAR definition of advisory and assistance services encompasses only management-type advice and assistance, and asserts that this solicitation is outside that definition because it is only for the acquisition of training support services. According to the Army, the contractor's employees will not provide advice and assistance to the agency in terms of how to manage this training program, will not participate in any management-level decision making, and will not otherwise assist the agency in meeting its policy development or program management responsibilities relating to the computer simulation training program.

The Federal Acquisition Streamlining Act of 1994 (FASA), 10 U.S.C. sec. 304b(e) (1994), provides that, in obtaining advisory and assistance services using task order type contracts (where the anticipated value is more than $10 million and the duration is more than 3 years), the solicitation must specifically provide for multiple awards unless the head of the agency concerned determines in writing that the services in question are so unique or highly specialized that it is not practicable to award more

than one contract. This provision essentially requires that agencies award multiple task order contracts for advisory and assistance services for high value, long term contracts unless the determination relating to the nature of the services has been executed. FAR sec. 16.503(d); see also S. Rep. No. 103-258, 103d Cong., 2d Sess. 15-16 (1994).[1]

FASA, 31 U.S.C. sec. 1105(g)(1) (1994), defines advisory and assistance services in terms of three categories:

"...the term 'advisory and assistance services' means the following services:

(i) Management and professional support services.
(ii) Studies, analyses and evaluations.
(iii) Engineering and technical services."[2]

FAR sec. 37.201 (FAC 90-41) further defines advisory and assistance services as including services to support or improve organizational policy development, decision making, management and administration, program and/or project management and administration, or research and development activities; it further states that outputs may include training and the day-to-day aid of support personnel needed for the successful support of ongoing federal operations. In addition, FAR sec. 37.201 provides three definitional subdivisions that mirror the statutory definition, namely, Management and Professional Support Services, Studies, Analyses and Evaluations, and Engineering and Technical Services. For purposes of this protest, the description of Management and Professional Support services is relevant; it provides:

"Management and professional support services, i.e., contractual services that provide assistance, advice or training for the efficient and effective management and operation of organizations, activities (including management and support services for [research and development] activities) or systems. These services are normally closely related to the basic responsibilities or mission of the agency originating the requirement for the acquisition of services by contract. Included are efforts that support or contribute to improved organization of program management, logistics management, project monitoring and reporting, data collection, budgeting, accounting, performance auditing, and administrative/technical support for conferences and training programs."

The GAO stated that it is clear that, insofar as training services are concerned, the statutory and regulatory definitions include administrative or technical services of a professional nature that support the agency's training personnel in

discharging their central mission-related obligations. The services at issue here provide critical, professional support to TRADOC's training personnel that enables them to effectively discharge their central mission of training brigade and battalion level officers. The contractor employees are required to be highly-skilled professionals--specifically, former Army officers with brigade and battalion level warfighting experience--and the services they provide--operation of the simulators, acting as 'interactors' for the trainees, and providing post-exercise data used by TRADOC's personnel in their critique of the exercise--are necessary for TRADOC's personnel to effectively perform their mission.

The GAO were not persuaded by the Army's position that contracts for management-related services are the only type contemplated by the statutory and FAR definitions of advisory and assistance services, or that training support services of the type being acquired here are outside of the applicable definitions. While the Army's position appears generally correct under the earlier version of this regulation, see FAR part 37.2 (FAC 90-16), the current FAR definition of advisory and assistance services describes management and professional support services and engineering and technical services in a manner somewhat broader than only management-related services. As quoted above, the last sentence of that portion of the advisory and assistance services definition that describes management and professional support services includes "...efforts that support or contribute to improved ...administrative/technical support for conferences and training programs." FAR, sec. 37.201(a) (FAC 90-41). This category of services--administrative/technical support for conferences and training--was not included in the earlier definition of management and professional support services. FAR sec. 37.203(c)(2) (FAC 90-16).

We note that the prior definition of advisory and assistance services found in the FAR specifically excluded training necessary to maintain skills necessary for normal operations, FAR sec. 37.203 (FAC 90-16), and this exclusion does not appear in the current FAR definition. When read together with the revised FAR description of management and professional support services, the elimination of this exception supports the conclusion that services in support of training necessary to maintain skills for normal operations, such as the training contemplated under this RFP, are now included within the revised definition of advisory and assistance services.[3]

Finally, the umbrella-type task order contract to be awarded under this RFP appears to be the kind of contract targeted by Congress under FASA; the solicitation contemplates the award of a single contract for virtually all of the Army's requirements for support of computer simulation training at a large number of facilities throughout the US. The Senate report regarding the relevant statutory provisions expressed a concern that:

"...the indiscriminate use of task order contracts for broad categories of ill-defined services necessarily diminishes competition and results in the waste of taxpayer dollars. In many cases, this problem can be effectively addressed...by awarding multiple task order contracts for the same or similar services. S. Rep. No. 103-258, 103d. Cong., 2d Sess. 15 (1994).

We conclude that the services under the RFP are encompassed by the FAR definition of advisory and assistance services, and that, due to the duration and dollar value of the contract, the Army was required to execute a determination and finding before proceeding on a requirements contract basis. Because it did not do so, the RFP is defective.[4]

In view of the foregoing, we are recommending by separate letter of today to the Secretary of the Army that the agency either amend the solicitation to provide for the award of multiple IDIQ type contracts, or execute the necessary written determination that the services at issue are so unique or of a highly specialized nature that it is not practicable to make multiple awards. We also recommend that Nations be paid the costs of filing and pursuing its protest, including reasonable attorneys' fees. Nations should submit its certified claim, detailing the time expended and the costs incurred, directly to the Army within 60 days of its receipt of this decision. 4 C.F.R. sec. 21.8(f)(1) (1996).

Comptroller General of the United States

1. For contracts that are below the $10 million/3-year threshold, or are for requirements other than advisory and assistance services, the FAR merely expresses a preference for multiple award task order contracting. 10 U.S.C. sec. 2304a(d)(3); FAR 16.504(c)(1), (2).

2. The definition of advisory and assistance services includes a number of specific exclusions that are not relevant here.

3. The Army relies on the terms of Department of Defense Directive No. 4205.2 and Army Regulation No. 5-14 in support of its argument that the services at issue are not advisory and

assistance services; both provisions specifically except from the definition of advisory and assistance services "training obtained for individual professional development." These provisions, which were promulgated prior to the passage of FASA in 1994 and the issuance of the new FAR provisions in 1995, have been superseded by the revised description of management and professional support services included in the current definition of advisory and assistance services.

4. Nations also contends that the RFP violates the Antideficiency Act, 31 U.S.C. sec. 1341 (1994), because the agency does not currently have funds appropriated for this requirement. However, the RFP includes the clause at FAR sec. 52.232-18, which is specifically designed for situations where an agency issues a solicitation contemplating the award of a contract for which funds have not yet been appropriated. The clause explains to offerors that funds are not yet available for the requirement, and that no government liability will arise for any payment until the contractor receives written notice from the contracting officer of the availability of funding. This allegation therefore is without merit.

B-271823
1 Aug 96
IGIT, Inc.

Paul H. Schramm, Esq., and Daniel R. Schramm, Esq., Schramm & Pines, L.L.C., for the protester. Lynn H. Patton, Esq., and Christopher Solop, Esq., Ott & Purdy, for Penn Enterprises, Inc.; Jesse W. Rigby, Esq., Clark, Partington, Hart, Larry, Bond, Stackhouse & Stone, for Crown American Laundry Services, Inc.; and Harold W. Robertson, for Robertson & Penn, Inc., the intervenors. Col. Nicholas P. Retson, and Maj. Michael J. O'Farrell, Jr., Department of the Army, for the agency. Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging contracting officer's decision to exclude protester from a competition because the protester possessed a page from the installation's solicitation register which included a lump-sum government estimate for the cost of the solicited work is sustained where there is no basis in the record to support a conclusion that the protester acted improperly in obtaining the document--even though the document should have been returned to the contracting officer--and where the information at issue could be provided to the other offerors to ameliorate any competitive advantage obtained by the protester with little damage to the integrity of the procurement.

DECISION

IGIT, Inc. protests its exclusion from a competition for laundry and dry cleaning services under request for proposals (RFP) DABT31-95-R-0017, issued by the Army. IGIT challenges as unreasonable the agency's decision to exclude it from the competition due to its possession of an agency document showing the lump-sum government estimate of the cost for these services.

We sustain the protest.

IGIT is the incumbent contractor currently providing laundry and dry cleaning services under a contract awarded 31 Jan 95, using sealed bidding procedures. Although IGIT's initial contract was awarded for a period of one year with four 1-year options, the Army decided shortly after award to refrain from exercising the options.[1] Instead, the Army issued a new solicitation for these services on 10 Dec 95. Proposals in response to the RFP were due by 28 Mar 96.

By letter dated 4 Mar 96, IGIT's African-American president and owner, Mr. Dewell Reeves, contacted his congressional representative regarding the Army's decision not to exercise the options in IGIT's laundry services contract and that it reflected a pattern of on-going bad faith and racial bias on the part of contracting personnel. Mr. Reeves appended to his letter, a page from the solicitation register, an internal agency document, to demonstrate that the decision not to exercise the options was made within weeks after the initial contract award.[2] The document, as provided to the congressman, contained one line of information showing the solicitation number; a short description of the requirement ("laundry"); the status of the procurement ("preparing RFP"); a lump-sum figure (entitled "estimate"); and two dates representing internal agency milestones in the preparation of the solicitation. The document contained no markings indicating that it should be treated as confidential. It was dated 18 Aug 95.

The contracting officer first learned of IGIT's letter to its congressman--and IGIT's possession of the lump-sum government estimate--on or about April 94, approximately one week after the receipt of initial proposals, when the installation's contracting personnel were provided the letter and its attachments with direction to prepare a draft reply to the congressional inquiry that followed receipt of the letter. Between 4 Apr and 12 Apr, several contracting personnel attempted to ascertain how IGIT came into possession of both the page from the solicitation register and the two internal memoranda prepared by the installation's Small and Disadvantaged Business Utilization (SADBU) specialist.[3] By letter dated 12 Apr, the contracting officer disqualified IGIT's proposal from further consideration in the ongoing competition. The letter, delivered by hand in a face-to-face meeting, justified the exclusion as follows:

"Your congressional inquiry…contained an excerpt of this directorate's solicitation register, which is not releasable to the general public. The register contains information developed by Directorate of Contracting (DOC) personnel, and includes [g]overnment estimates of individualized procurement actions.

"Your possession of the government estimate clearly establishes an appearance and perception that you had privileged information which gave you an apparent competitive advantage over the other offerors."

During this meeting, the DOC asked Mr. Reeves how he obtained the page from the solicitation register. Mr. Reeves explained that the document appeared taped to the front door of the laundry site in Jul 95, and that his secretary found it upon arriving at work.

information at issue is cost-related, General Elec. Gov't Servs., Inc., B-245797.3, 23 Sept 92, 92-2 CPD para. 196; whether the information is proprietary, KPMG Peat Marwick, supra; or whether the information is source selection sensitive. Holmes&Narver Servs., Inc./Morrison-Knudson Servs., Inc., a joint venture; Pan Am World Servs., Inc., supra. We also consider whether the information was obtained through improper business conduct, Compliance Corp., supra, or through more innocuous means, such as a Freedom of Information Act request pursued through appropriate agency channels. KPMG Peat Marwick, supra.

IGIT's Possession of the Government Estimate

The contracting officer concluded that IGIT's possession of the government estimate gave it an apparent competitive advantage over the other offerors, and it was IGIT's possession of this estimate that formed the basis of the decision to exclude IGIT from the procurement. While the Army concedes that the lump-sum government estimate in this case was not marked to indicate its confidential nature, it argues that the information is not normally given to offerors, and that it clearly imparts a competitive advantage when available to only one offeror. We agree. Given the obvious competitive value of an agency's estimate of the cost to perform solicited work, we find reasonable the contracting officer's determination that steps were necessary to alleviate the competitive advantage to IGIT. See Holmes&Narver Servs., Inc./Morrison-Knudson Servs., Inc., a joint venture; Pan Am World Servs., Inc., supra (protest against failure to take steps to alleviate an alleged competitive advantage was sustained where the awardee had access to the independent government estimate, acquisition plan, and evaluation criteria). Based on our review of the record, however, we do not find reasonable the Army's conclusion that excluding IGIT from the competition was appropriate or necessary to remedy the advantage created by its possession of this information.

Looking first at IGIT's conduct in this matter, we cannot conclude that IGIT acted improperly in obtaining the solicitation register. Exclusion of an offeror is a more reasonable sanction if the offeror's conduct in obtaining a competitive advantage was improper. See Compliance Corp., supra (exclusion based on "industrial espionage" involving an attempt to induce an employee of competing offeror to sell proposal information); NKF Eng'g, Inc., 65 Comp. Gen. 104 (1985), 85-2 CPD para. 638 (exclusion based on the hiring of the contracting officer's representative between submission of initial proposals and receipt of best and final offers, and a subsequent significant drop in that offeror's final price). In contrast, when the record did not show a likelihood of an actual impropriety or conflict of interest, we

Handwritten notes from the meeting by the DOC also reflect that Mr. Reeves stated he believed the information was provided to him in order to let him know that there would be a new solicitation and that the Army would not be exercising the options in his contract.

By letter dated 19 Apr, IGIT protested to the GAO, alleging its exclusion was made in bad faith in retaliation for Mr. Reeves' efforts to bring his claim of racial discrimination to the attention of his congressional representative.

An agency's decision to exclude an offeror from a competition in order to remedy a problem related to the integrity of a particular procurement requires a balancing of competing interests set forth in the Federal Acquisition Regulation (FAR). On the one hand, contracting officers are granted wide latitude in their business judgments to safeguard the interests of the US in its contractual relationships. FAR part 602-2; Compliance Corp., B-239252, 15 Aug 90, 90-2 CPD para. 126, aff'd, B-239252.3, 28 Nov 90, 90-2 CPD para. 435. On the other hand, the same section of the FAR requires contracting officers to ensure impartial, fair, and equitable treatment of all contractors. FAR part 1.602-2(b); KPMG Peat Marwick, B-251902.3, 8 Nov 93, 93-2 CPD para. 272, aff'd, Agency for Int'l Dev.; Development Alternatives, Inc.--Recon, B-251902.4; B-251902.5, 17 Mar 94, 94-1 CPD para. 201.

A contracting officer may protect the integrity of the competitive procurement system by disqualifying an offeror from a competition where the firm may have obtained an unfair competitive advantage, even if no actual impropriety can be shown, so long as the determination is based on facts and not mere innuendo or suspicion. NKF Eng'g, Inc. v. US, 805 F.2d 372 (Fed. Cir. 1986); Holmes & Narver Servs., Inc./Morrison-Knudson Servs., Inc. a joint venture; Pan Am World Servs., Inc., B-235906; B-235906.2, 26 Oct 89, 89-2 CPD para. 379, aff'd, Brown Assocs. Management Servs., Inc.--Recon., B-235906.3, 16 Mar 90, 90-1 CPD para. 299; Laser Power Technologies, Inc., B-233369; B-233369.2, 13 Mar 89, 89-1 CPD para. 267. We will overturn such a determination only when it is shown to be unreasonable. Defense Forecasts, Inc., 65 Comp. Gen. 87 (1985), 85-2 CPD para. 629; RAMCOR Servs. Group, Inc., B-253714, 7 Oct 93, 93-2 CPD para. 213.

In reviewing the reasonableness of an exclusion decision, we examine both the nature of the information to which the offeror had access, Textron Marine Sys., B-255580.3, 2 Aug, 94-2 CPD para. 63, and the conditions under which access was gained. KPMG Peat Marwick, supra. For example, we consider whether the

have overturned an agency's decision to exclude an offeror from the competition. See KPMG Peat Marwick, supra. Here, nothing in the record before us contradicts IGIT's explanation for its possession of this document--i.e., that it was taped to the door of the laundry facility during the summer of 95, apparently to advise IGIT of the agency's decision to resolicit for laundry services rather than exercise the existing options.[4] We, therefore, have no basis to reject IGIT's version of events.

In addition, while we agree with the Army and the intervenors that IGIT should have returned the document to the contracting officer, IGIT's responses to the Army's questions suggest that it simply did not recognize the competitive value of the lump-sum estimate. IGIT's apparent failure to recognize the sensitive nature of the lump-sum estimate contained on the solicitation register may be explained by the fact that the figure included is essentially IGIT's bid price for the existing contract.[5] On the continuum between improper actions such as "industrial espionage" and the more innocuous filing of a Freedom of Information Act request, we consider IGIT's failure to return the page from the solicitation register closer to the latter than the former.

Finally, in considering the appropriate remedy for alleviating an offeror's competitive advantage, in a case where there is little evidence of improper activity, we view exclusion as a severe remedy that is reasonable only when other, less drastic, remedies are not practicable, or are insufficient. For example, in a case where we sustained a protest on the ground that the awardee had a conflict of interest--specifically, the awardee employed a former government official with access to restricted information (including the government estimate) to help draft the proposal--we expressly rejected the remedy of excluding the awardee from the competition and instead recommended releasing the restricted information to all the offerors and calling for a new round of proposals. Holmes&Narver Servs., Inc./Morrison-Knudson Servs., Inc. a joint venture; Pan Am World Servs., Inc., supra.

Here, as in Holmes&Narver, release of the government estimate to all offerors is the reasonable remedy for the competitive advantage accruing to IGIT. Although the agency and the interested parties argue that the release of the estimate will create an auction, there are several factors to suggest that any adverse effect from the release of this estimate will be minimal, and will be consistent with our prior decisions. In this regard, we note that the government estimate in this case is considerably less detailed than the one released in Holmes&Narver, where the estimate included cost calculations for each of 27 separate functions. In addition, the estimate here conveys essentially no

more information to offerors than he release of the contract price when the previous award was made to IGIT via sealed bids. Since the prior price of these services is clearly public information, and the difference between the two figures is essentially de minimis, we see no serious damage to the integrity of the procurement system from the release of this estimate.[6] Thus, under the circumstances here, eliminating IGIT's competitive advantage while retaining IGIT as an offeror outweighs the government's interest in not appearing to conduct an auction.[7] KPMG Peat Marwick, supra; Holmes&Narver Servs., Inc./Morrison-Knudson Servs., Inc. a joint venture; Pan Am World Servs., Inc., supra.

We conclude that the decision to exclude IGIT from the competition here does not strike a reasonable balance between the agency's appropriate recognition of the need to ameliorate the competitive advantage arising from IGIT's possession of the government estimate, and the requirement to treat IGIT fairly. Thus, the Army's actions, no matter how well-intentioned, violate the mandate of FAR part 1.602 requiring contracting officers to ensure impartial, fair and equitable treatment of contractors. We recommended that the Army eliminate any competitive advantage given IGIT by providing the lump-sum government estimate to all offerors and requesting a new round of proposals.

We also recommended that the protester be reimbursed the reasonable costs of filing and pursuing this protest, including attorneys' fees. 4 C.F.R. sec. 21.8(d) (1996). The protester should submit its certified claim for protest costs directly to the agency within 90 days of receipt of this decision. 4 C.F.R. sec. 21.8(f)(1).

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1. The written memorandum formally requesting resolicitation of these services is dated 25 May 95.

2. Other information appended to Mr. Reeve's letter to his congressional representative will be discussed below.

3. These memoranda were also attached to the letter to the congressman. Neither document contains procurement sensitive information, although one contains sensitive internal information providing some support for the protester's views regarding his allegations of racial bias at the installation.

4. For the record, while we have no rebuttal of the protester's version of how it received the page from the solicitation register, the agency report's legal memorandum does express

doubts about the protester's explanation. The report points out that: (1) Mr. Reeves has claimed to have a source in the DOC; (2) Mr. Reeves states that the SADBU gave him the memorandum for the record that provides some support for his claims; and (3) certain IGIT documents were found on the SADBU's computer. Thus, the Army implies that the SADBU provided the page from the solicitation register, and explains that it has requested a Criminal Investigative Division review of whether the SADBU was the protester's source. However, the SADBU denies providing the document to IGIT, and the doubts expressed in the agency report amount only to suspicion.

5. Although the two figures are very similar, they are not identical; nonetheless, the approximate 2.5 percent difference in the figures suggests that IGIT's successful bid price in the most recent competition provided the basis for the estimate.

6. Since the previous procurement was awarded using sealed bidding procedures, under which bids are opened publicly, IGIT's previous price for these services is publicly available. FAR part 14.101.

7. We need not reach the protester's allegation that racial bias was, in part, a motivating factor in this case as we sustain the protest and recommend that IGIT be permitted to participate in the procurement.

Harry A. Stroh Associates, Inc., B-274335, 4 Dec 96

DOCUMENT FOR PUBLIC RELEASE: A protected decision was issued on the date below and subject to a GAO Protective Order. This version has been redacted or approved by the parties involved for public release. Matter of Harry A. Stroh Assoc, Inc.

Gilbert J. Ginsburg, Esq., and Raymond Fioravanti, Esq., Epstein, Becker & Green, P.C., for the protester. Donald E. Barnhill, Esq., and Joan K. Fiorino, Esq., East & Barnhill, for Ace Maintenance & Services, Inc., an intervenor. Thomas J. Duffy, Esq., and Terence Cleary, Esq., Department of the Army, for the agency. Andrew T. Pogany, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where a request for proposals sets forth the provisions of Federal Acquisition Regulation (FAR) clause 52.215-16, Alt II (FAC 90-31), advising offerors of the agency's intent to award without conducting discussions, contracting agency may properly do so, provided the contracting officer reasonably determines that discussions are unnecessary. Contracting agency reasonably determined to award to the offeror which submitted the technically superior proposal at a fair and reasonable price based on initial proposals, despite protester's arguments that a possibility existed that its inferior technical proposal could eventually become, through discussions, the best value proposal.

DECISION

Harry A. Stroh Assoc, Inc., (Stroh) protests the award of a fixed-price contract, on the basis of initial proposals, to Ace Maintenance & Services, Inc., under request for proposals (RFP) DABT11-96-R-0001, issued by the Army for complete housekeeping services at several hospitals and clinics. Stroh contends that the agency unreasonably failed to conduct discussions by making award on the basis of initial proposals.\1

We deny the protest.

The RFP, issued on 27 Mar 96, provided that award would be made to the offeror whose proposal provided the best value to the government considering the evaluation factors set forth in Section M of the RFP. The RFP contemplated a base year performance period with four 1-year option periods. The technical evaluation factors, in descending order of importance, were as follows: (1) technical management/organization; (2) staffing; (3) past performance/experience; (4) business

management; and (5) technical and management transition. The RFP stated that price would not be assigned a numerical score but would be considered of equal importance to the combined technical evaluation factors. The RFP also stated that "[a]ll efforts will be made to evaluate the proposals without conducting discussions and requesting [b]est and [f]inal offers."\2

The agency received 13 proposals by 5 Jun 96, the closing date for receipt of initial proposals. The technical proposals were evaluated by a source selection evaluation board (SSEB) with the following results:\3

Offeror	Technical	Price
Ace	[Deleted]	$21.6 million
Offeror A	[Deleted]	[Deleted]
Stroh	[Deleted]	[Deleted]
Offeror B	[Deleted]	[Deleted]\4

Based on the evaluation results, the SSEB made the following recommendation to the source selection authority (SSA):

"[A] thorough evaluation of all the proposals revealed that Ace Maintenance Services, Inc., had a technically superior proposal and should be awarded the contract without discussions.

[T]he board evaluated all other proposals as not acceptable for inclusion in the competitive range. The board felt that deficiencies noted were not correctable within the time frame for contract award. Therefore, it was unanimously agreed upon by the Board to not establish a competitive range but to rather make contract award to the offeror who demonstrated the most complete understanding of the government scope of work and PWS requirements."

The SSA reviewed the evaluation results. With respect to Ace, the SSA found, among other things, that the firm's procedures manual and technical proposal were very well organized, structured following the PWS and the Quality Assurance Surveillance Plan, and clearly demonstrated a thorough understanding of the PWS and the concept of total disinfection cleaning vital in hospital housekeeping. The SSA also determined that Ace's staffing matrix was clear and concise, and "very close" to the IGE annual hours. In contrast, the SSA determined that Stroh's procedures manual conflicted with the PWS and that the firm's Quality Control Program met minimum needs but did not demonstrate a full understanding of the government's

requirements. Further, the SSA found that Stroh's staffing matrix did not show hours adequate to meet all requirements since certain "shift leaders" were not shown, and assignments were not made to cover many areas of the hospital. The SSA concluded as follows:

"Based on the significant superiority of Ace's proposal and their price being considered fair and reasonable, it is determined that it is not to the government's advantage to conduct discussions."\5

The agency awarded the contract to Ace on 16 Aug 96. This protest followed.

Where, as here, an RFP sets forth the provisions of FAR Part 52.215-16, Alt II (FAC 90-31), advising offerors of the agency's intent to award without conducting discussions, the contracting agency may properly do so, provided the contracting officer reasonably determines that discussions are unnecessary. See FAR Part 15.610(a)(3) (FAC 90-31); see generally Lloyd-Lamont Design, Inc., B-270090.3, 13 Feb 96, 96-1 CPD ¶ 71.

Stroh, in its initial protest, argued, on information and belief, that the agency could not properly have made an award to Ace based on initial proposals because "Ace's proposal was found to have contained deficiencies. "Stroh offered no support or explanation for this allegation. Stroh received the agency report which detailed the evaluation of Ace's proposal, including the agency's specific determination that Ace's technical proposal was significantly superior to Stroh's (and other offerors') proposals.\6 After reviewing the report, Stroh withdrew the allegation that Ace's proposal contained a deficiency.

Stroh, in its comments, for the first time argues that the agency could not properly have made an award based on initial proposals because Ace's technical proposal received a rating of only "satisfactory" in one subfactor and that under the source selection plan (SSP), the agency was required to conduct discussions notwithstanding the explicit terms of the RFP permitting award on the basis of initial proposals.\7

We find this argument to be untimely. To be considered timely, protest issues must be raised not later than 10 days of when the basis for protest was or should have been known. Bid Protest Regulations, Part 21.2(a)(2), 61 Fed. Reg. 39039, 39043 (1996) (to be codified at 4 C.F.R. § 21.2(a)(2)). Accordingly, this

protest ground will not be considered. Stroh was aware of this basis of protest not later than when it received the agency report, but first raised the matter in its comments on the agency report which were filed more than 10 calendar days after Stroh received the report.\8

Finally, Stroh argues that it should have received the award based on its initial proposal because its proposal was acceptable and lower in price, or that the agency should have conducted discussions with offerors. The RFP here specifically advised offerors that the government intended to evaluate proposals and award a contract without discussions and that each initial proposal should contain the offeror's best terms. Based on the initial proposals received, the agency determined that Ace's proposal represented the best value to the government based on its technical superiority and reasonable price. We do not think that the mere possibility that an inferior initial proposal could eventually become, through discussions, the best value proposal precludes the agency from awarding the contract to the offeror with the clearly best value proposal based on initial proposals. Concerning Stroh's argument that its proposal did not contain the deficiencies found by the agency and was acceptable, Stroh does not argue that its proposal (even absent these deficiencies) was technically equal to Ace's proposal and does not contest the agency's determination that Ace's proposal was clearly superior. Under these circumstances, we have no basis to object to the agency's award without discussions to Ace. Compare Information Spectrum, Inc., B-256609.3; B-256609.5, 1 Sep 94, 94-2 CPD ¶ 251 (discussions were not necessary where the agency could reasonably determine which offer represented the best value to the government) with The Jonathan Corp.; Metro Mach. Corp., B-251698.3; B-251698.4, 17 May 93, 93-2 CPD ¶ 174 (discussions were necessary where the agency could not reasonably determine which proposal represented the best value to the government, given the significant discrepancy between the agency's cost realism estimate and the cost proposals received and the closeness of the competition); see also TRW, Inc., B-254045.2, 10 Jan 94, 94-1 CPD ¶ 18.

The protest is denied.\9

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NOTES

\1 In its comments on the agency report, the protester withdrew certain other issues initially raised in its original protest.

\2 Section L of the RFP incorporated by reference FAR Part 52.215-16 (FAC 90-31), entitled "CONTRACT AWARD (OCT 1995)--Alt II," which provides that the government "intends to evaluate proposals and award a contract without discussions. Therefore, each initial offer should contain the offeror's best terms from a cost or price and technical standpoint."

\3 The SSEB used a numeric scale of [deleted]. We show the results for the four highest ranked offerors.

\4 The independent government estimate (IGE) was [deleted]. Although a fixed-price contract was contemplated, the RFP did require certain price support data from offerors to validate whether proposed prices were consistent with the technical proposals. The agency conducted a price analysis which included a comparison of Ace's price to the current contract as adjusted for additional requirements, general and administrative rates, profit rates and a comparison to other offerors' prices and the IGE.

\5 The contracting officer states, contrary to arguments advanced by the protester in its comments, that no competitive range determination was made by the agency. The agency simply selected the best value offeror based on initial proposals. The record supports this view.

\6 Counsel for the protester also received Ace's entire technical and price proposals under a protective order issued by our Office.

\7 The SSP stated that a rating of "satisfactory" indicates that the proposal "[m]eets minimum requirements of the solicitation; [deleted]; [a]ward made with detailed discussion and revised proposal." [Deleted].

\8 Stroh requested and received an extension for filing its comments with our office; this does not toll the requirement to timely file any additional basis or bases of protest that are revealed by the agency report. See Dial Page, Inc., B-256210, 16 May 94, 94-1 CPD ¶ 311. Additionally, we note that a contracting agency's failure to follow an SSP does not provide a basis for questioning the validity of an award selection because the SSP is an internal agency instruction and, as such, does not give outside parties any rights. See Johnson Controls World Servs., Inc., 72 Comp. Gen. 91 (1993), 93-1 CPD ¶ 72.

\9 Stroh also alleged that the award was not preceded by a cost/technical tradeoff. While the contracting officer did not execute any formal document denominated as a cost/technical

tradeoff or otherwise explicitly set forth a tradeoff determination, it is clear from the record that in determining that discussions were not necessary the contracting officer did determine that Ace's significant technical superiority was worth its price, even though that price was appropriately 10-percent higher than the protester's.

Matter of: The Cowperwood Co.
File: B-274140.2
26 Dec 96

Edward V. Gregorowicz, Jr., Esq., for the protester. David H. Peirez, Esq., Reisman, Peirez, Reisman & Calica, and Robert G. Fryling, Esq., Blank Rome Comisky & McCauley, for Continental Terminals, Inc., an intervenor. Barry D. Segal, Esq., General Services Administration, for the agency. Mary G. Curcio, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. An agency properly may reopen discussions and request an additional round of best and final offers (BAFOs) from all competitive range offerors in order to permit an offeror the opportunity to correct proposal deficiency and possibly obtain a lower price. Agency reasonably determined that reopening in such circumstances is in government's interest.

2. Where the agency provided the protester with evaluation information during a debriefing held before making award to another offeror, but subsequently determined that it was necessary to reopen the competition, agency properly equalized the protester's potential competitive advantage by disclosing similar information to the other offerors in the competition.

DECISION

The Cowperwood Co., protested the decision of the General Services Administration (GSA) to reopen discussions and request additional rounds of BAFOs under solicitation MNY95-387, for construction and lease of office space.

We deny the protest.

The GSA received and evaluated several initial proposals. Following discussions, the agency advised the competitive range offerors that it would not evaluate the prices proposed for the option period because the BAFO option prices were widely divergent. The GSA believed that offerors, knowing that the option prices would not be evaluated, had no incentive to offer competitive prices. The GSA amended the solicitation to provide for evaluation of option prices. Following receipt and evaluation of the second BAFOs, the agency selected Continental Terminals, Inc., for award.

Before the award was final, GSA held a debriefing with Cowperwood. The GSA revealed information concerning the proposal evaluation areas in which Continental had scored higher than Cowperwood, such as Cowperwood's scores/weaknesses in the different evaluation areas, and Continental's price. Before the award was finalized, the GSA received several agency-level protests. During the review of these protests, the GSA determined that Continental's proposal was technically unacceptable because the termination rights it granted the government did not comply with the requirements of the solicitation. The GSA decided to reopen discussions and request a third round of BAFOs to give Continental the opportunity to correct this deficiency. In order to eliminate any unfair advantage Cowperwood may have gained by virtue of the debriefing information it received before reopening, the agency revealed similar information to the other competitive range offerors.

Cowperwood maintains that the competition should not be reopened. Cowperwood maintained that since Continental's first and second BAFOs were technically unacceptable, and their own first and second BAFOs were the lowest-priced, technically acceptable offers received, Cowperwood believes the appropriate course of action would be to make award to Cowperwood. This argument is without merit. The GSA was not required to reopen the competition after first and second BAFOs, but neither was it precluded from doing so. A contracting agency properly may reopen discussions following receipt of BAFOs where it determines that doing so is in the government's best interest. Federal Acquisition Regulation § 15.611(c) (FAC 90-31); NDI Eng'g Co., Inc., 66 Comp. Gen. 198 (1987), 87-1 CPD ¶ 37; Management Sys. Applications, Inc., B-259628; B-259628.2, 13 Apr 95, 95-1 CPD ¶ 216. There is nothing improper in an agency's reopening a competition and requesting additional BAFOs in order to permit the revision of a proposal it has determined to be otherwise strong. Research Analysis and Management Corp., B-218567.2, 5 Nov 85, 85-2 CPD ¶ 524. This is precisely what GSA did--it determined that reopening discussions and requesting third BAFOs--to permit Continental to revise its proposal--was in the government's interest. There simply was no requirement that the agency instead reject Continental's proposal and make award based on another offeror's first or second BAFO.

The fact that GSA disclosed pricing and technical information to the offerors before it requested third BAFOs does not change the conclusion. While we preferred that the original disclosure not have occurred, the only question is whether the agency essentially should be precluded from considering Continental's proposal for award--instead of permitting correction of the deficiency--because of the disclosure. There is no basis for

such a conclusion; the disclosure of information to equalize competition is an appropriate alternative to eliminating an offeror from a competition due to a prior disclosure of information that could result in an unfair competitive advantage. KPMG Peat Marwick, 73 Comp. Gen. 15 (1993), 93-2 CPD ¶ 272. This approach is particularly appropriate here in light of the facts that (1) Continental had nothing to do with the original disclosure and gained no benefit from it; (2) Cowperwood actually was a primary beneficiary of the disclosure, since it will have an opportunity to submit a BAFO based on the information it learned about Continental's highest-rated proposal; and (3) it will enable the agency to consider all proposals for this high-cost project and to make award based on the one most advantageous to the government.

Cowperwood also challenged the evaluation of its BAFOs. Since the award decision was based on the evaluation of the new BAFOs, this basis of protest was academic.

Comptroller General of the United States